

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PRAKASH T. MELWANI	:	ORDER
	:	DTA NO. 818490
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1996 through May 31, 1999.	:	

Petitioner, Prakash T. Melwani, 350 Third Avenue, Suite 365, New York, New York 10011, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1996 through May 31, 1999.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 2, 2002 at 1:15 P.M. and continued to conclusion at the same location on May 7, 2002 at 12:30 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (John Adrian).

The Presiding Officer issued a determination on August 1, 2002 which granted the petition of Prakash T. Melwani and canceled a Notice of Determination dated May 30, 2000.

By letter filed August 13, 2002, petitioner, appearing *pro se*, brought an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Barbara G. Billet, Esq. (Kathleen D. O'Connell, Esq., of counsel), filed an affirmation in opposition on September 19, 2002, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs, the Division's affirmation in opposition, the determination issued August 1, 2002 and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. On May 30, 2000, following an audit, the Division of Taxation ("Division") issued to petitioner, Prakash T. Melwani, a Notice of Determination which assessed \$42,586.93 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 1996 through May 31, 1999. The notice informed petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Soups & Breads, Inc. and therefore personally liable for the sales and use taxes due from that corporation.

2. The record in this matter shows that petitioner signed a Federal tax return (Form 1120) and a Federal Form 1122 as the president of Soups & Breads, Inc. Petitioner also signed two power of attorney forms appointing a representative for Soups & Breads, Inc.

3. In addition, the record contains what purported to be petitioner's signature on six Soups & Breads, Inc. sales tax returns and a New York General Business Corporation MTA Surcharge Return (Form CT-3M/4M). At hearing petitioner denied that he signed these documents. In his determination the Presiding Officer agreed with petitioner and determined that the signature on these six sales tax returns and Form CT-3M/4M was not that of petitioner.

4. Following the small claims hearing, the Presiding Officer issued a determination canceling the Notice of Determination dated May 30, 2000. The Presiding Officer concluded that petitioner was not a responsible officer of Soups & Breads, Inc.

5. By letter dated August 12, 2002 petitioner made an application to the Division of Tax Appeals for costs totaling \$353.00. Specifically, petitioner seeks \$125.00 for witness fees, \$160.00 (\$80.00 per diem) for taking notes and taking care of exhibits, \$56.00 for parking, and \$12.00 for copying costs. Petitioner offered no documentation of the claimed expenses.

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the *prevailing party* may be awarded a judgment or settlement for:

(1) *reasonable administrative costs* incurred in connection with such administrative proceeding within the department, and

(2) reasonable litigation costs incurred in connection with such court proceeding. (Emphasis added.)

As relevant herein, *reasonable administrative costs* include reasonable fees paid in connection with the administrative proceeding (*see*, Tax Law § 3030[c][2][B]).

Prevailing party is defined for purposes of section 3030, in relevant part, as follows:

(A) In general. The term “prevailing party” means any party in any proceeding to which [Tax Law § 3030(a)] applies (other than the commissioner or any creditor of the taxpayer involved):

(i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the

amount sought, including an itemized statement from an attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and (II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed

(B) Exception if the commissioner establishes that the commissioner's position was substantially justified.

(i) General rule. *A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) of this section applies if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.*

(ii) Burden of proof. The commissioner shall have the burden of proof of establishing that the commissioner's position in a proceeding referred to in subdivision (a) of this section was substantially justified, in which event, a party shall not be treated as a prevailing party.

(iii) Presumption. For purposes of clause (i) of this subparagraph, the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iv) Applicable published guidance. For purposes of clause (ii) of this subparagraph, the term “applicable published guidance” means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical services bureau memoranda, and (II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court. (Tax Law § 3030[c][5]; emphasis added.)

B. Petitioner’s motion is denied because the position of the commissioner (i.e., the Division) was “substantially justified” (Tax Law § 3030[c][5][B]). Accordingly, petitioner may not be treated as the prevailing party for purposes of Tax Law § 3030 and therefore may not recover costs.

Tax Law § 3030 is clearly modeled after Internal Revenue Code § 7430. It is proper, therefore, to use Federal cases for guidance in analyzing this state law (*see, Matter of Levin v. Gallman* 42 NY2d 32, 396 NYS2d 623; *Matter of Sener*, Tax Appeals Tribunal, May 6, 1988).

A position is substantially justified if it has a reasonable basis in both fact and law (*see, Information Resources, Inc. v. United States*, 996 F2d 780, 785). The fact that the Division lost the case on the merits does not preclude a finding that its position was substantially justified (*see, Heasley v. Commr.*, 967 F2d 116, 120).

In this case the Presiding Officer determined that petitioner was not a responsible officer of Soups & Breads, Inc. Responsible officer determinations are factual determinations properly made on a case-by-case basis (*see, Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564, *Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862).

The case law and the decisions of the Tax Appeals Tribunal have identified a variety of factors to be considered in determining whether an individual had sufficient control over a corporation to be considered a responsible officer for sales tax purposes (*see, Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). Several of these factors are present in this case.

Specifically, petitioner signed a Federal tax return (Form 1120) and a Federal Form 1122 as the president of Soups & Breads, Inc. Thus he may have been, at least nominally, president of the corporation. Petitioner also signed two power of attorney forms appointing a representative for Soups & Breads, Inc. In addition, the record contains what purported to be petitioner's signature on six Soups & Breads, Inc. sales tax returns and a New York General Business Corporation MTA Surcharge Return (Form CT-3M/4M). Although petitioner established that he did not sign these documents, the existence of these returns, together with petitioner's genuine signature on

other tax documents as noted above, establishes that the Division's position had a reasonable basis in both fact and law and was therefore substantially justified.

C. Even if the Division's position was not substantially justified, the instant motion is properly denied because petitioner failed to show that he was an individual whose net worth was less than \$2,000,000.00 when the proceeding was commenced (Tax Law § 3030[c][5][A][ii][II]). Petitioner's application failed to provide any statement regarding his net worth.

D. Inasmuch as petitioner's application for costs fails for the reasons discussed above, this order does not address the reasonableness or propriety of the specific costs claimed by petitioner in his application.

E. Petitioner's application for costs is denied.

DATED: Troy, New York
October 24, 2002

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE